

Supreme Court, U. S.

FILED

MAY 26 1976

IN THE

SUPREME COURT OF THE UNITED STATES

MICHAEL RODAK, JR. CLERK

October Term, 1976

66-525

DONALD SCHANBARGER, Petitioner,

v.

JOHN J. McNULTY, JR., Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
SECOND CIRCUIT COURT OF APPEALS OF THE
UNITED STATES

DONALD SCHANBARGER

Petitioner Pro Se

Salem, New York 12865

May 20, 1976

September, 1976 recasted reprint

ROBERT LYMAN Esq., Respondent's Attorney
County Courthouse, Albany, New York 12207

INDEX

	Page
Opinion (order) below	2
Jurisdiction	2,3
Questions presented	3,4
Statement of The Case	5,6,7
Reasons to grant writ	7,8
Conclusion	8
Appendix	App. 1 -16
District Court Order	App. 1 -11
42 U.S.C. Sec. 1983	App. 12
14th Amendment, Sec. 1&5	App. 13
Court of Appeals order	App. 14-16

CITATIONS

Cases:	Page
CAMPBELL v BETO, 460 F2d 765	7
CARTER v STRANTON, 405 US 669	7
JOHNSON v AVERY, 393 US 483	7
U.S. Constitution	
Article 3 Sec. 2	2,6
5th Amendment	2,3
8th Amendment	2,3
9th Amendment	2,3
10th Amendment	2,3
14th Amendment	2,3,4
U. S. STATUES	
42 USC Sec. 1983	2,6
28 USC Sec. 1254	2

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976

NO.

DONALD SCHANBARGER, Petitioner,

v.

JOHN J. McNULTY, JR., Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
SECOND CIRCUIT COURT OF APPEALS OF THE
UNITED STATES

The petitioner Donald Schanbarger respectfully prays that a writ of certiorari issue to review the order of the Second Circuit Court of Appeals of the United States of April 30, 1976.

OPINION BELOW BY ORDER

U.S. District Court for the Northern District of New York, appears in the Appendix 1-14 hereto. Second Circuit Court of Appeals of the United States appears in the Appendix 14-16 hereto.

JURISDICTION

The April 30, 1976 Order of the Second Circuit Court of Appeals of the United States affirmed the 5/5/75 Order of U.S. District Court for Northern New York. Assurtd are 42 USC Sec. 1983, U.S. Constitution's Article 3 Sec. 2 and 5th, 8th, 9th, 10th & 14th Amendments. Petition is under USC Sec. 1254(1) to estab-

lish that all classes of people can assure rights against anyone of the class of government agents, and filed within 30 days.

QUESTIONS PRESENTED

1. Whether A FEDERAL COURT FAILING TO TAKE JUDICIAL NOTICE OF THE UNITED STATES CONSTITUTION WITH OR WITHOUT REQUEST, VIOLATES THE PERSONAL RIGHTS CLAUSES OF THE 8th, 9th, & 10th AMENDMENTS AND EQUAL PROTECTION, PROHIBITED STATE CONDUCT AND DUE PROCESS CLAUSES OF THE 5th & 14th AMENDMENTS OF THE FEDERAL CONSTITUTION, WHEN EVERY MEMBER OF THE UNITED STATES JUDICIARY HAVE AGREED TO SUPPORT IT AS A CONDITION OF THEIR OFFICE AS SUCH A MEMBER? (In Complaint)

2. Whether a county sheriff in failing to supply his inmates in his jail with access to a library with criminal law books

that would be needed to defend one's self from incarceration violates the equal protection, prohibited state conduct and due process clauses of the 14th amendment of the federal Constitution, when a hired defence whether innocent or guilty falls within the doctrine of waste? (In motion paper at District Court)

The issues are whether the 14th AMENDMENT of the FEDERAL CONSTITUTION requires a county sheriff to supply his inmates with facilities to:

- (a) Obtain writing paper at will for legal mail,
- (b) To place mail for mailing more than 3 days a week, or 2 days a week should one day fall on a federal holiday,
- (c) To mail legal mail that is not on printed stationary.
- (d) Dental care with the exception of ex-

extracting teeth,

- (e) Access to a library with criminal law books that would be needed to defend ones self from incarceration, and
- (f) Jail clothes.

And if an injunction against future incarceration of anyone without such facilities, and punitive and exemplary damages, costs and attorney fees are assignable for the lack thereof, all of which a district court must take judicial notice with and/or without request?

STATEMENT OF THE CASE

Donald Schanbarger when incarcerated in a county jail by Sheriff JOHN J. McNULTY, was not supplied facilities that he would had used to:

- (a) Obtain writing paper at will for legal mail,
- (b) To place mail for mailing more then

3 days a week, or 2 days a week should one day fall on a federal holiday,

- (c) To mail legal mail that is not on printed stationary,
- (d) Dental care with the exception of extracting teeth,
- (e) Access to a library with criminal law books that would be needed to defend ones self from incarceration, and
- (f) Jail clothes.

Donald Schanbarger moved for an injunctions against future incarceration of anyone without such facilities, punitive and exemplary damages, cost and attorney fees under 42 USC Sec. 1983 violations of the federal Constitution's 14th Amendment's equal protection, due process and prohibited state conduct clauses, with Article 3 Sec. 2 claimed. Motion was made before answer to the Complaint,

that it be dismissed, which it was by the District Court over the objection of the plaintiff. The framed questions on p. 3-4 herein were raised as indicated. The dismissal of the Complaint is based on poor pleading and insufficiency. The dismissal of the Complaint was affirmed by the Court of Appeals.

REASONS TO GRANT WRIT

1. To establish that COMITY does not mean that the CONSTITUTION means nothing among friends.

2. To re-enforce JOHNSON v AVERY, 393 US 483, respecting to legal assistance.

3. To support CAMPBELL v BETO, 460 F2d 765, that medical treatment is a right.

4. To re-enforce CARTER v STRANTON, 405 US 669, that one need not exhaust State remedies for Federal judicial relief.

5. To establish that inmates may not be required to subsidize incarceration.

CONCLUSION

For these reason, a writ of certiorary should issue to review the order and with the opinion so held, to the Second Circuit Court of Appeals of the United States.

Submitted,

DONALD SCHANBARGER
Petitioner Pro Se

May 20, 1976

September, 1976 recasted reprint

(ORDER)

App. 1.

UNITED STATES DISTRICT COURT

DONALD SCHANBARGER,

Plaintiff,

-against

75-CV-93

JOHN J. McNULTY, JR.,

Defendant.

APPEARANCES:

OF COUNSEL:

DONALD SCHANBARGER

Pro Se

Salem, New York 12865

ROBERT P. ROCHE

TERENCE L. KINDLON

Albany County

Assistant Albany

Attorney

County Attorney

Albany County Court House

Albany, New York 12207

JAMES T. FOLEY, D. J.

MEMORANDUM-DECISION and ORDER

This plaintiff filed a pro se two-page

(ORDER)

App. 2.

civil rights complaint and paid the fees for filing and service of process upon the single named defendant, Sheriff John J. McNulty, Jr. The complaint assumedly drawn by this layman, a dairy farmer in Washington County, succinctly and clearly sets forth the jurisdictional grounds and the general factual allegations based upon which constitutional violations are alleged to have occurred. The jurisdiction is asserted under the familiar 42 U.S.C. 1983, "and equal protection, due process and prohibited state conduct clauses of the 14th amendment of the United States Constitution."

The essential factual allegations to be appraised are set forth in paragraph 3 of the complaint:

Between October 7th thru 30th 1974, the plaintiff was incarcerated in de-

(ORDER)

App. 3.

fendant's jail known as the Albany County jail, where plaintiff was not supplied facilities to:

- (a) Obtain writing paper at will for legal mail.
- (b) To place mail for mailing more than 3 days a week, or 2 days a week should one mail day fall on a federal holiday.
- (c) To mail legal mail that is not on jail printed stationery.
- (d) Dental care with the exception of extracting teeth,
- (e) Access to a library with criminal law books that would be needed to defend ones self from incarceration.

(ORDER)

App. 4.

(f) Jail clothes.

Judgment is demanded against the defendant Sheriff "injoining (sic) incarceration of any person without providing facilities of this complaint, for \$30,000. as exemplary (sic) and punitive damages, for costs, and for attorney fees."

In behalf of the defendant Sheriff, a formal motion was filed by the Albany County Attorney, specifically pursuant to Fed. R. Civ. P. 12(b) (6) to dismiss ground they fail to state claims upon which relief can be granted. The motion is supported by the affidavit of Assistant County Attorney Terence L. Kindlon and the attached Exhibits "A", "B" and "C". Exhibit "A" is an affidavit of Warden Beam that details the mailing regulations existent in the Albany County Jail, the provision for emergency dental care to ex-

(ORDER)

App. 5.

tract teeth, and the access to criminal law books allowed inmates. The plaintiff in writing countered this motion by a motion to deny this motion for dismissal "on grounds of poor faith". The motions were heard in open court, and the plaintiff presented his own argument in person, and it developed during the argument that he was wearing the same civilian clothes that he wore during his 90-day jail confinement and which he says should have been replaced by prison garb to lessen the wear and tear upon his own clothes. I asked the plaintiff if he wanted me to appoint a lawyer to assist him in presenting further briefing. He said he thought he could handle it and he filed a brief described as "Submitted after argument", and it does set forth adequately case and text reference that are

(ORDER)

App. 6.

in point and relate to the issues he claims have federal substances. It is apparent that plaintiff is devoting substantial time to the abundance of writing now existent concerning prisoner problems and the ever increasing resort to the federal courts for their presentation and review. There are noted rulings that complaints of this kind are to be treated with extreme liberality by the federal courts in the determination whether sufficient is alleged to warrant an opportunity to offer supporting evidence concerning the constitutional violations and deprivations. See Haines v. Kerner, 404 U.S. 519 (1972); Wilwording v. Swenson, 404 U.S. 249 (1971). Equally so this liberalism is to be balanced by the admonition that federal courts do not have the responsibility to supervise the general

(ORDER)

App. 7.

administration of prisons and prison officials must be accorded the widest latitude in the administration of prison affairs, and prisoners are subject to appropriate rules and regulations. *Cruz v. Beto*, 405 U.S. 319, 321 (1972); see also *Procunier v. Martinez*, 416 U.S. 396, 404-405 (1974). The violations and deprivations must amount to ones of constitutional stature, and in my view under settled federal case law, the only ones asserted here arguably so would be (d) and (e) of paragraph three of the complaint concerning dental care and access to criminal law books. In the oral argument, plaintiff described that his complaint about his personal dental care involved a filling or the need of one, and the failure to have an accumulation of criminal law books pertinent to his particular in-

(ORDER)

App. 8.

volvement with the law. In this context, neither in my judgment as presented create issues reasonable acceptable as one of federal constitutional magnitude.

In his complaints about the mailing privileges, there is no contention that the result was denial of access to the courts. See *Cristman v. Skinner*, 468 F.2d 723 (2d Cir. 1972); *Wright v. McMann*, 460 F.2d 126 (2d Cir. 1972). Correctional facilities and county jails have a right to regulate a prisoner's mail and federal courts do not interfere with such regulations. See *Procunier v. Martinez*, 416 U.S. 396 (1974); *Wolff v. McDonnell*, 418 U.S. 539 (1974); *Pell v. Procunier*, 417 U.S. 817 (1974).

Medical treatment claim must allege deliberate indifference to its need and I assume dental treatment would come un-

(ORDER)

App. 9.

der the same rationale. *Corby v. Conboy*, 457 F.2d 251 (2d Cir. 1972); *U.S. ex rel, Hyde v. McGinnis*, 429 F.2d 864 (2d Cir. 1970); *Church v. Hegstrom*, 416 F.2d 449 (2d Cir. 1969); see also for extreme lack of proper medical treatment and necessary equipment, *Newman v. Alabama*, 503 F.2d 1320 (5th Cir. 1974), cert. den., *Alabama v. Newman*, ___ U.S. ___, 4/28/75, 43 U.S. Law Week 3580. There is nothing of this nature contended from the reading of the allegations or developed in the oral argument of the plaintiff. The law book deprivation is lacking the same detail and substance in the form made and does not rise to constitutional stature. See *Johnson v. Avery*, 393 U.S. 483 (1969); *Younger v. Gilmore*, 404 U.S. 15 (1971), aff'g *Gilmore v. Lynch*, 319 F. Supp. 105 (ND Cal. 1970).

(ORDER)

App. 10

There is no intention in this writing to belittle the sincerity of the plaintiff in his alleged grievances. The plaintiff was courteous and pleasant in his oral argument, and frank and straightforward in response to court questions at that time. However, in my opinion, the grievances do not rise to the necessary constitutional level that warrant their entertainment and decision by a federal district court. The practices and conduct complained of conformed with State rules and regulations. These problems should be for the responsible state administrators whose duty under the State Constitution is to "visit and inspect ... all institutions used for the detention of sane adults charged with or convicted of crime." N.Y. State Constitution, Article XVII, Sec. 5. The management of

(ORDER)

App. 11

the jails is controlled by detailed regulations which can be enforced by the State Commission of Correction. See 7 N.Y. Codes, Rules and Regulations, Chapter XXX, Part 5100 et seq.

The complaint is dismissed in its entirety for failure to state any viable claims under the federal civil rights statutes upon which relief can be granted. The formal motion of the defendant in that regard is granted, and the counter-motion of the plaintiff against dismissal is denied.

It is so Ordered.

Dated: May 5, 1975

Albany, New York

/S/ James T. Foley

UNITED STATES DISTRICT JUDGE

App. 12

42 U.S.C. Sec. 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or territory, subjects or causes to be subject, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitutional laws, shall be liable to the parties injured in an action at law, suit and equity, or other proper proceeding for redress.

App. 13

U.S. CONSTITUTION, 14th AMENDMENT

Sec. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State where in they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States: nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Sec. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

(ORDER)

App. 14

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the Thirtieth day of April one thousand nine hundred and seventy-six.

Present:

HONORABLE J. EDWARD LUMBARD

HONORABLE STERRY R. WATERMAN

HONORABLE THOMAS J. MESKILL

Circuit Judges,

(ORDER)

App. 15

DONALD SCHANBARGER,

Plaintiff-Appellant,

v.

#75-7302

JOHN J. MC NULTY, JR.,

Defendant-Appellee.

Appeal from the United States District
Court for the Northern District of New
York

This cause came on to be heard on the
transcript of the record from the United
States District Court for the Northern
District of New York, and was argued by
counsel.

ON CONSIDERATION WHEREOF, it is now
hereby ordered, adjudged, and decreed
that the judgment of said District Court
be and it is hereby affirmed on the

(ORDER)

App.16

opinion below.

/s/ J. Edward Lumbard

J. EDWARD LUMBARD

/s/ Sterry R. Waterman

STERRY R. WATERMAN

/s/ Thomas J. Meskill

THOMAS J. MESKILL

Circuit Judges